(1)

91-1752

Supreme Court, U.S.
FILED
MAR 23 1992
OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

RUSSELL JAMES WOOD, M.D.,
Petitioner,

vs.

MELVIN J. FREEDMAN, M.D., et al.,
Respondents.

Petition for a Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. May the judiciary give absolute immunity to Fifth Amendment Due Process violators when Congress specifically stated in the original and controlling statute 42 U.S.C. Section 1320c-6 that immunity is contingent on due care being exercised?

LIST OF PARTIES

The parties before the Court of Appeals included the petitioner Russell James Wood, MD and the respondents Melvin J. Freedman, MD; Alan J. Stein, MD; Norman Taylor, MD; Chester Hill, MD; Edward DuVivier, MD; Harold J. Kolb, MD; Central Illinois Medical Review Organization; Thomas O'Neill; Crescent Counties Foundation for Medical Care; Thomas R. Hyngstrom, PhD; Marshall T. Hale, MD; Michael Brewer, MD; Michael Pick, MD; George Taylor MD; Walter R. Williams, MD; J.D. Winterhalter, MD; Robert Bruce, MD; Christopher Green, MD and one or more John Does, to be named or discovered.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENT FOR REVIEW	i
LIST OF PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS AND STATUTES	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING REVIEW	6
I. THE DECISION BELOW IS IN CONFLICT WITH OTHER CIRCUITS AND WITH THIS COURT	6
II. QUALIFIED IMMUNITY IS SPECIFIED IN LEGISLATIVE HISTORY, LEGISLATION AND JUDICIAL INTERPRETATION	7
A. LEGISLATIVE HISTORY	7
B. LEGISLATION	8
C. JUDICIAL INTERPRETATION	9
D. QUALIFIED IMMUNITY PRESENT IN ALL PEER REVIEW	9

III. THIS COURT SHOULD DECIDE IF THE STATUTE SHOULD BE INTERPRETED AS IT IS WRITTEN 9

CONCLUSION 11

TABLE OF AUTHORITIES

Page

Cases:

Chevron v. Natural Res. Def. Council, 467 U.S. 837 (1984) 10

Dozier v. Professional Foundation for Health Care, Inc., 944 F.2d 814 (1991) 6,9

Kwoun v. Southeast Missouri Professional Standards Review Organization, 811 F.2d 401 (8th Cir. 1987), *cert. denied*, 108 S.Ct. 1994 (1988)..... 4,6,10

Patrick v. Burget, 486 U.S. 94 (1988) 6,9

Summit Health v. Pinhas, 111 S.Ct. 1842 (1991) 6,9

Taylor v. Flint Osteopathic Hospital, 561 Supp. 1153 (E.D. Mich. 1983), 765 F.2d 146 (6th Cir. 1985) 6,9

FEDERAL STATUTES:

28 U.S.C. Section 1254(1) 1

15 U.S.C. Section 1 2

42 U.S.C. Section 1320c-6 2,8,11

United States Constitutional Amendment 5 2

Social Security Amendments of 1972, Pub. L. No. 92-603, Section 249F, 86 Stat. 1444 (1972), codified as amended at 42 U.S.C. Section 1320c-6..... 8

Peer Review Improvement Act of 1982, Pub. L. No. 97-248, tit. I, Section 143, 96 Stat. 382 (codified as amended at 42 U.S.C.Section 1320c-6..... 8

Health Care Quality Improvement Act of 1986 9

Other Authorities:

S. Rep. No. 1230, 92d Cong., 2d Sess. (1972) 7

S. Rep. No. 494, 97th Cong., 2d Sess. (1982) 7

Congressional Record, Jan. 25, 1972, Vol. 118 7

APPENDIX:

Seventh Circuit Court of Appeals, unpublished, October 25, 1991 ..... A-1

Appendix B Supplement:

US District Court of
Southern Illinois

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

RUSSELL JAMES WOOD, M.D.,
Petitioner,

vs.

MELVIN J. FREEDMAN, M.D., et al.,
Respondents.

Petition for a Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

Russell James Wood respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals from the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the Seventh Circuit Court of Appeals (Appendix, a-1) is unpublished, dated October 25, 1991.

JURISDICTION

The judgment of the Court of Appeals was issued on October 25, 1991. The extension of sixty days for filing this writ was

granted on January 17, 1992, extending the time to March 23, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Fifth Amendment to Constitution:

> No person shall . . . be deprived of life, liberty, or property, without due process of law; . . .

Sherman Act Section 1, 15 U.S.C. Section 1:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . .

42 U.S.C. Section 1320c-6. Immunity and Liability Section of U.S.C. Section 1320c-et seq. (1982) for Peer Review Organizations:

> (a) Providers of information. Notwithstanding any other provision of law, no person providing information . . . shall . . . be liable . . . *unless* . . . such information is false.
>
> (b) Employees and fiduciaries of organizations having contracts with Secretary. No person who is employed by, or who has a fiduciary relationship with, any such organization or who furnishes professional services to such organization shall be held by reason of the performance by him of any duty, function, or activity required or authorized pursuant to this part or to a valid contract entered into under this part, to have violated any criminal law, or to be civilly liable under any law of the United States or of any State (or political subdivision thereof) *provided he has exercised due care*.

(c) Physicians and providers. No doctor of medicine or osteopathy and no provider (including directors, trustees, employees, or officials thereof) of health care services shall be civilly liable to any person under any law of the United States or of any State (or political subdivision thereof) on account of any action taken by him in compliance with or reliance upon professionally developed norms of care and treatment applied by an organization under contract pursuant to section 1320c-2 of this title operating in the area where such doctor of medicine or osteopathy or provider took such action; *but only if*—

(1) he takes such action in the exercise of his profession as a doctor of medicine or osteopathy or in the exercise of his functions as a provider of health care services; and

(2) he *exercised due care* in all professional conduct taken or directed by him and reasonably related to, and resulting from, the actions taken in compliance with or reliance upon such professionally accepted norms of care and treatment.

(d) Reimbursement . . . of legal proceedings. The Secretary shall make payment to . . . the defense of any suit . . . related to the performance of any duty or function under such contract by such organization, member, or employee.

STATEMENT OF THE CASE

Petitioner brought an action under 42 U.S.C. Section 1320c-6 against two peer review organizations and their physician members contending a peer review action against petitioner's Illinois hospital affecting Medicare patients in a bistate medical practice was predicated on unfounded charges of deficient quality of care as a product of antitrust conspiracy.

The peer reviewers and peer review organizations exceeded their scope of authority with sanction recommendations based on erroneous reports and failure to actually verify reports before using them for a basis to sanction.

The actions of the peer reviewers and peer review organizations were in violation of Section 1 of the Sherman Act and of property rights guaranteed by the Due Process Clause of the Fifth Amendment of the Constitution.

This action was originally filed in Missouri as a result of the petitioner's allegation of intentional infliction of emotional harm and loss of property and reputation resulting from unfounded charges and based upon abrogation of due process rights.

The District Court of Eastern Missouri transferred the action to the State of Illinois where the District Court of Southern Illinois dismissed all counts pursuant to the court's interpretation of the decision of the Eighth Circuit Court of Appeals granting absolute immunity to defendants in the case of *Kwoun v. Southeastern Missouri Peer Standards Organization*, 811 F.2d 401 (8th Cir. 1987), *cert. denied*, 108 S.Ct. 1944 (1988).

Petitioner next perfected an appeal to the United States Court of Appeals for the Seventh Circuit contesting the validity of the Kwoun decision and the application of that case by the trial court granting the defendant-appellees absolute immunity on the basis that all defendant-appellees were federal actors and prosecutors.

This case addresses the issue of peer review immunity. Absolute immunity was found by the Eighth Circuit, followed by the Seventh, without consideration of the specific statutory language designating immunity contingent on due care.

A dissenting Judge in each court recognized the creating and controlling 42 U.S.C. Section 1320c-6 specified the exercise of due care.

The issue at bar is whether the creating statute provides for qualified immunity based on the concept of due care or absolute immunity based upon judicial designation originating at the trial court level.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW IS IN CONFLICT WITH OTHER CIRCUITS AND THIS COURT.

Congress specifically placed a limited type of qualified immunity in the original and controlling legislation by stating that immunity is dependent on the exercise of due care.

This statutory requirement was present in the original 42 U.S.C. Section 1320c-6 in 1972 governing *Kwoun, supra,* in the 1982 version governing the case at bar, and is in the 1991 version.

The Sixth Circuit in *Taylor v. Flint Osteopathic Hospital, Inc.*, 765 F.2d 146 (1985) agreed with its district court that only qualified immunity exists.

The Eleventh Circuit in *Dozier v. Professional Foundation for Health Care, Inc.*, 944 F.2d 814 (1991) did not consider anything but qualified immunity.

This Court allowed qualified immunity in *Patrick v. Burget*, 486 U.S. 94 (1988).

This Court accepted qualified immunity in *Summit Health, Ltd. v. Pinhas*, 111 S.Ct. 1842 (1991), a case not available to the Seventh Circuit. Recognition of congressional ability to control peer review immunity was secondary to the main thrust of the case, but specifically mentioned by all Supreme Court Justices. The majority stated on page 1848, "The restraint was accomplished by an alleged misuse of a congressionally regulated review process . . . " and the dissenting Justices on page 1849, "The Court has no doubt concerning the power of Congress to regulate a peer-review process . . . ".

II. QUALIFIED IMMUNITY IS SPECIFIED IN LEGISLATIVE HISTORY, LEGISLATION AND JUDICIAL INTERPRETATION

Congress meant to provide some immunity for the physicians in peer review to entice them to participate as accountable private citizens, not as government employees.

The legislative history, the legislation, and judicial interpretations (except for the Eighth and then the Seventh appellate courts) are all consistent with qualified immunity.

A. LEGISLATIVE HISTORY

The legislative history of 42 U.S.C. Section 1320c-6 extends from 1972, when Congress first thought Medicare expenses were becoming excessive and desired to control them. The same considerations for qualified immunity have continued through the 1982 version into the 1991 version with persistence of qualified immunity.

S. Rep. No. 1230, 92d Cong., 2d Sess. (1972) and S. Rep. No. 494, 97th Cong., 2d Sess. (1982) reveal Congress desired to establish an independent private force which was also accountable.

Senator Bennett was the author of legislation establishing review organizations. In the January 25, 1972 Congressional Record, Vol. 118, he states in the second column on page 1017:

> "The amendment is so structured that practicing physicians *rather than* Government agencies or insurance company personnel will decide whether care was necessary and of proper quality. At the same time, I have built numerous safeguards into the amendment to assure *public accountability and proper and professional monitoring of the review organizations.*"

and in the third column on the same page:

> " . . . practicing physicians . . . in . . . *accountable* fashion . . . "

and in the second column on page 1018 the summary of the amendment states:

> Those persons engaged in review activities would be exempt from liability for actions taken in the *proper performance of these duties.*

(emphasis added)

B. LEGISLATION

Congress provided for immunity only if "due care was exercised" in the 1972 Social Security Act originating Peer Standards Review Organizations (PSROs). This limited immunity was continued in 1982 when Peer Review Organizations were formed to modernize and update the PSROs, and has been continued in the 1991 version.

42 U.S.C. Section 1320c-6 states in pertinent part:

(a) Providers of information are not liable *unless* such information is unrelated or false.

(b) Employees are not civilly liable *provided due care is exercised.*

(c) Doctors are not liable if *due care is exercised.*

(d) The Secretary of HHS will pay legal fees.

The persistent theme is that no one is liable "*provided he has exercised due care*". (emphasis added)

C. JUDICIAL INTERPRETATION

The finding of absolute immunity is an anomaly which stands out among the findings of other courts. Two circuits have found qualified immunity consistent with the legislation:

The Sixth Circuit in *Taylor, supra* found qualified immunity.

The Eleventh Circuit in *Dozier, supra* found qualified immunity.

The Eighth and then the Seventh found absolute immunity, each with a dissenting vote for qualified immunity.

This Court did not allow peer reviewers to have absolute immunity in *Patrick, supra.*

All nine Supreme Court Justices discussed congressional regulation of peer review activity in a positive manner for qualified immunity in *Summit Health, supra.*

D. QUALIFIED IMMUNITY PRESENT IN ALL PEER REVIEW LEGISLATION

Congress has specified qualified immunity in all peer review acts. The Social Security Act of 1972 and its revisions in 1982 and 1991 all retained the statement designating immunity "provided he has exercised due care."

The Health Care Quality Improvement Act of 1986 has similar good faith immunity at 42 U.S.C. Section 1111 2(a).

III. THIS COURT SHOULD DECIDE IF THE STATUTE SHOULD BE INTERPRETED AS WRITTEN

Congress specifically designated immunity for peer reviewers as long as they exercised due care. This needs to be

recognized and the judicial conversion of qualified immunity to absolute immunity needs to be addressed.

The question appears to be whether Congress gave immunity to private citizens where they had none, or gave qualified immunity when they did not need it because they were already protected with absolute immunity.

Then the question becomes whether they should be allowed to have absolute immunity when Congress specifically legislated only qualified immunity.

Judge Heaney states in *Kwoun, supra,* 8ll F.2d at 413:

> "If Congress wishes to extend absolute immunity to those who participate in the peer-review process in prosecutorial or adjudicative functions, it is free to do so. *Until it does, I believe we are bound by the statute as written.*"

The plain language doctrine of *Chevron v. Natural Res. Def. Council,* 467 U.S. 837 (1984) at 842 states that, "if the intent of Congress is clear, that is the end of the matter." Congress made qualified immunity very clear and specific in all three peer review doctrines over a twenty year span. 42 U.S.C. Section 1320c-6 has been retained throughout, consistently stating immunity as long as "due care is exercised."

That means immunity as long as due care is exercised. It also means that if due care is not exercised, there is no immunity.

The statement is essentially the same in each of the three statutes, which strongly suggests that the general overview of Congress is immunity only as long as due care is attained.

The Eight Circuit ruled absolute immunity even though Congress stated liability should exist if no due care. This is not following the language of the statute. This is contrary to other legal interpretations and the meaning of the act, and as *Chevron,*

supra at 843 states "the court . . . must give effect to the . . . expressed intent of Congress."

CONCLUSION

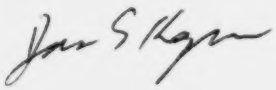
The opinion below is in direct conflict with other circuits and with this Court's recognition of qualified immunity in other cases.

Qualified immunity is consistent with this Court's emerging concepts over the past two decades. It is also consistent with other legislation and is accepted public policy by academic journalists, civil rights groups, and political activists. The statutory interpretation of 42 U.S.C. 1320c-6 affects virtually every health care worker and health care facility in the United States.

This Court should interpret this statute to guide lower courts in the administration of peer review.

For these reasons, the petitioner requests the Court accept review and reverse the decision below.

Respectfully Submitted,



Dan S. Kerpan

Attorney for Petitioner
Russell James Wood

CERTIFICATE OF SERVICE

I, Dan S. Kerpan, an attorney, certify that I caused copies of the foregoing petition to be served upon the attorneys listed below:

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by causing the same to be deposited with the United States Post Office today, this 23rd day of March, 1992.

Dan S. Kerpan

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604
ARGUED AUGUST 6, 1991

NO. 89-3685

UNPUBLISHED ORDER
NOT TO BE CITED
PER CIRCUIT RULE 53

RUSSELL JAMES WOOD,
Plaintiff-Appellant,

v.

MELVIN J. FREEDMAN, ALAN J. STEIN, NORMAN TAYLOR, CHESTER HILL, EDWARD DUVIVIER, HAROLD J. KOLB, CENTRAL ILLINOIS MEDICAL REVIEW ORGANIZATION (CIMRO), THOMAS O'NEILL, R. WEST, DBA FOLLMER & WEST (CIMRO'S ATTORNEY), CRESCENT COUNTIES FOUNDATION FOR MEDICAL CARE, T. R. HYNGSTROM, W. ADAIR & L. M. TRUSDELL, MARSHALL T. HALE, MICHAEL BREWER, MICHAEL PICK, GEORGE TAYLOR, WALTER R. WILLIAMS, J. D. WINTERHALTER, ROBERT BRUCE, ONE OR MORE JOHN DOES AND CHRISTOPHER GREEN,
Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Illinois,
Alton Division.

No. 89 C 5080

William L. Beatty, Judge

BEFORE:

Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. DANIEL A. MANION, Circuit Judge
Hon. JESSE E. ESCHBACH, Senior Circuit Judge

ORDER

Dr. Russell J. Wood brought this action under 42 U.S.C. Section 1320c-5(b)(4) against twenty defendants, including two peer review organizations ("PROs") and their physician members, based on a sanction recommendation of the PROs to exclude him from participating in the federal Medicare program for a one year period. Dr. Wood alleged violations of the federal and Missouri constitutions and antitrust laws, the federal RICO statute, as well as various common law torts. The district court, relying on the Eighth Circuit's decision in *Kwoun v. Southeast Missouri Professional Standards Review*, 811 F.2d 401 (8th Cir. 1987), *cert. denied*, 486 U.S. 1022 (1988), dismissed the action on the ground that the defendants were absolutely immune from liability. Dr Wood appeals from this dismissal. We affirm.

In *Kwoun*, the Eighth Circuit held that the PROs and their physician members, acting as federal officials, had absolute immunity from constitutional and common law claims arising out of the exclusion sanctions process. 811 F.2d at 406-09. The Eighth Circuit based its holding on the prosecutorial nature of the PROs review activities after considering the factors specified in *Butz v. Economou*, 438 U.S. 478, 513 & 515-16 (1978). *Id.* at 408-09. It reasoned that absolute immunity for PROs leads to an effective, efficient and economical Medicare program, and is "'essential for the conduct of public business' in this critical health care area." *Id.* at 409 (quoting *Butz*, 438 U.S. at 507). It reasoned further that the availability of administrative and judicial review, coupled with the power of the Department of Health

and Human Services to terminate its contract with a PRO, provide adequate safeguards against abusive PRO practices. *Id.*

We agree with the Eighth Circuit's reasons for extending to PROs and their members the protection of absolute immunity for sanction activities, and therefore apply the holding in *Kwoun* to preclude Dr. Wood's claims against the defendants. Cases in this and other circuits support the same rule. *See Scott v. Schmidt,* 773 F.2d 160 (7th Cir. 1986) (harness racing counsel); *Trotter v. Klincar,* 748 F.2d 1177 (7th Cir. 1987) (parole board); *Reed v. Village of Shorewood,* 704 F.2d 943 (7th Cir. 1983) (liquor commissioner); *Ashbrook v. Hoffman,* 617 F.2d 474 (7th Cir. 1980) (partition commissioner); *see also Austin Mun. Sec., Inc. v. Nat'l Ass'n of Sec. Dealers,* 757 F.2d 689 (5th Cir. 1985) (disciplinary officers of securities dealers' association); *Bushman v. Seiler,* 755 F.2d 653 (8th Cir. 1985) (consultant to medicare carrier for HHS); *Simons v. Bellinger,* 643 F.2d 774 (D.C. Cir. 1980) (disciplinary committee members of bar association). Neither the Supreme Court's decision in *Westfall v. Erwin,* 484 U.S. 292 (1988), nor the Federal Employees Liability Reform and Tort Compensation Act of 1988 ("Westfall Act"), impacts upon this rule. The *Westfall* decision does not apply to federal officials acting in a prosecutorial capacity, whereas the Westfall Act excludes from its coverage independent contractors like PRO members, *see Leone v. United States,* 910 F.2d 46, 49-50 (2d Cir. 1990), *cert. denied,* 111 S.Ct. 1103 (1991).

Dr. Wood's first argument for disregarding *Kwoun* is that the defendants do not rank high enough in the federal hierarchy to qualify for absolute immunity. This argument lacks merit. The Supreme Court and this Court have held that it is not the rank of the public official but his function that determines the immunity afforded him. *See, e.g., Burns v. Reed,* 111 S.Ct. 1934, 1939 (1991); *Butz,* 438 U.S. at 508; *Barr v. Matteo,* 360 U.S. 564, 572-074 (1959); *Buckley v. Fitzsimmons,* 919 F.2d 1230, 1240 (7th Cir. 1990); *Mother Goose Nursery Schools, Inc. v. Sendak,* 770 F.2d

668, 671 (7th Cir. 1985), *cert. denied*, 474 U.S. 1102 (1986); *Oyler v. Nat'l Guard Ass'n*, 743 F.2d 545, 553 (7th Cir. 1984).

Dr. Wood's second argument is that the indemnification and limited liability provisions contained in 42 U.S.C. Section 1320c-6 show that Congress sought to rule out absolute prosecutorial immunity for PRO sanction activities. The Eight Circuit rejected this argument in *Kwoun*, concluding that "Congress, unaware that the courts would find some consultants advising government agencies to be federal actors for immunity purposes," enacted the provision as "an effort to extend some protection to people who were thought to have none, rather than an attempt to restrict protection already acknowledged to exist." *Kwoun*, 811 F.2d at 409 n.13 (emphasis in original). We concur in this conclusion. We find no evidence that Congress intended to abrogate the common law immunities available to the PROs and their physician members when they engage in quasi-prosecutorial functions, and refuse to create any such an intent when Congress is silent.

AFFIRMED

No. 89-3685

CUDAHY, Circuit Judge, dissenting:

Although the peer review defendants here are entitled to a qualified immunity, I am not persuaded that they are entitled to a more sweeping absolute immunity. 42 U.S.C. Section 1320c-6(b), which applies to the peer review defendants, provides as follows:

> (b) Employees and fiduciaries of organization shaving contracts with Secretary. No organization having a contract with the Secretary under this part [42 USC Sections 1320c et seq.] and no person who is employed by, or who has a fiduciary relationship with any such organization or who furnishes professional services to such organization, shall

> be held by reason of the performance of any duty, function, or activity required or authorized pursuant to this part [42 USC Sections 1320c et seq.] or to a valid contract entered into under this part [42 USC Sections 1320c-et seq.], to have violated any criminal law, or to be civilly liable under any law of the United States or of any State (or political subdivision thereof) provided due care was exercised in the performance of such duty, function or activity.

In the face of this specific statutory prescription, we may not assume that Congress believed that there was a common-law absolute privilege and chose to add to it. It seems more reasonable to me that Congress intended to provide the full extent of the intended privilege in the statute and by implication rejected a more extensive common-law immunity. The problem is ably addressed by Judge Heaney dissenting in *Kwoun*, 8ll F.2d 401, 410.

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SUPPLEMENT TO THE
Petition for a Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

APPENDIX B

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IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF ILLINOIS

Filed Jul 31, 1989
Stuart J. O'Hare
Clerk, U.S. District Court
Southern District of Illinois
Alton Office

No. 89 5080

RUSSELL JAMES WOOD, MD,]
Plaintiff,]
]
-vs-]
]
MELVIN J. FREEDMAN, MD, Et al.,]
Defendants.]

This matter is before the court on the renewed and expanded motion to Dismiss Plaintiff's Second Amended Complaint filed on behalf of Crescent County's Foundation for Medical Care (Crescent Counties), Thomas R. Hyngstrom, Wendell H. Adair, Jr, and Laurence M. Trusdell, based upon the Plaintiff's failure to state a cause of action upon which relief may be granted.

The Plaintiff originally brought this cause of action on April 5, 1988, in the Circuit Court for the Twenty Second Judicial Circuit of Missouri against over 20 defendants based upon their participation in a sanction recommendation by the federal Peer Review Organization (PRO) for the State of Illinois under the federal Medicare program. The action was removed to the United States District Court for the Eastern District of Missouri. On January 6, 1989, this cause was transferred to this court pursuant to 28 U.S.C. §1404(a).

The plaintiff's second amended complaint

consists of 33 pages wherein the plaintiff claims damages in several counts based upon a number of legal theories, i.e., violations of the Sherman and Clayton Acts; violations of the federal RICO statute; negligence; libel/slander; willful and wanton misconduct and/or fraud; tortious interference with contracts; and violations of the state anti-trust laws. All of the plaintiff's alleged damages were sustained as a result of the federal government's decision to exclude the plaintiff from the federal Medicare program pursuant to the recommendation of Crescent Counties, the federal Peer Review Organization for the State of Illinois.

Movant Hyngstrom is the executive director of Crescent Counties and movants Adair and Trusdell are the attorneys for Crescent Counties. Crescent Counties is a federal review organization established pursuant to 42 U.S.C. §1320c-2, to insure that physicians participating in the Medicare program meet the obligation to assure that medical care provided to Medicare beneficiaries will be provided only when medically necessary, and that the medical care will be provided economically and will be of a quality meeting professionally recognized standards of health care. 42 U. S. C. §1320c-5(a). The professional review organization enters into a contract with the Health Care Financing Administration of the Department of Health and Human Services to be responsibile for a particular geographic area. 42 U.S.C. §1320c-2.

The function of the Professional Review Organization is to review some or all of the professional activities in the area to determine whether the health care services being provided are reasonable and medically necessary; are of a quality which meets

professional standards; and are being performed economically. 42 U.S.C. §1320c-3 (a)(1).

As a result of this procedure, Crescent Counties recommended that the plaintiff be excluded from the federal Medicare program for one year as a sanction for failing to meet the statutory obligations to provide the specific type of medical care to Medicare beneficiaries as described in 42 U.S.C. §1320c.

The moving defendants base their motions to dismiss on the grounds that participants in the federal peer review process are entitled to absolute federal officers/actor immunity from all state law claims and absolute judicial prosecutorial immunity from all claims, state or federal. In support of its position, the moving defendants rely on Kwoun v. Southeast Missouri Professional Standards Review Organization, 811 F.2d 401 (8th Cir. 1987), cert. denied, _____U.S._____, 108 S.Ct. 1994, 100 L. Ed. 2d 226 (1988), Rehearing denied, _____ U.S. _____, 109 S.Ct. 200. In Kwoun, the Court held that the regional peer organizations were held to be federal actors for the purpose of any analysis of their activities in relation to the investigation, in that the review process was established and governed by federal law. Kwoun, 811 F.2d at 406-407. As federal officials, the court further held that the participants of the review process were "immune from common law tort claims if their actions were not ". . . manifestly or palpably beyond [their] authority." Bushman, 755 F. 2d at 655, quoting Norton v. McShane, 332 F.2d 855, 859 (5th Cir. 1964), Cert. denied, 380 U.S. 981, 85 S. Ct. 1345, 14 L.Ed.2d 274 (1965)."

With respect to the constitutional

claims, the Kwoun Court recognized that the reasoning for granting absolute immunity to federal officials from common law tort claims, i.e., to protect them "in the execution of their federal statutory duties from criminal or civil actions based on state law," Butz v.Economou, 438 U.S. 478, 489, 98 S.Ct. 2894, 2902, 57 L.Ed.2d 895 (1978) does not apply to claims based on violation of constitutional law. Id. 438 U.S. at 495, 98 S.Ct. at 2905, Kwoun, 811 F.2d at 405. Thus, with respect to constitutional claims, absolute immunity is only granted in "those exceptional situations where it is demonstrated that absolute immunity is required for the conduct of public business." Butz, 438 U.S. at 507, 98 S.Ct. at 2911. Accordingly, absolute immunity is required for the conduct of public business when judicial, prosecutorial and legislative functions are involved. Harlow v. Fitzgerald, 457 U.S. 800, 811, 102 S. Ct. 2727, 2734, 73 L. Ed.2d 396 (1982).

In analyzing the functions of the peer review groups, the Kwoun Court held that the peer review groups are indeed functioning in a prosecutorial role in that the peer review group has the obligation of deciding whether a proceeding should be brought and what sanctions should be sought against a specific target. Kwoun, 811 F.2d at 406, 408-09.

Similarly, under the reasoning of Butz v. Economou, supra, participants in the federal peer review process must be afforded absolute immunity for any claimed violations of federal and state statutes. As the court stated in Butz,

> [w]e also believe that agency officials performing certain functions analogous to those of a prosecutor should be able

> to claim absolute immunity with respect to such acts. The decision to initiate administrative proceedings against an individual or corporation is very much like the prosecutor's decision to initiate or move forward with a criminal prosecution. An agency official, like a prosecutor, may have broad discretion in deciding whether a proceeding should be brought and what sanctions should be sought . . .
>
> The discretion which executive officials exercise with respect to the initiation of administrative proceedings might be distorted if their immunity from damages arising from that decision was less than complete. Cf. Imbler v. Pachtman, 424 U.S. at 426 n. 24, 96 S.Ct. at 993 n.24. While there is not likely to be anyone willing and legally able to seek damages from the officials if they do not (Emphasis in original) authorize the administrative proceeding, Cf, Id, at 437, 96 S. Ct. at 998 (White, J. concurring in judgment), there is a serious danger that the decision to authorize proceedings will provoke a retaliatory response. An individual targeted by an administrative proceeding will react angrily and may seek vengeance in the courts. A corporation will muster all its financial and legal resources in an effort to prevent administrative sanctions.
>
> Butz, 438 U.S. at 515, 98 S.Ct. at 2915. (Emphasis added).

Through exercising the responsibilities of the peer review organization, i.e., in the role of federal actors/officers and the role of a prosecutor, the defendants would be entitled to absolute immunity from any claims brought against them, be it

statutory violations, common law torts or constitutional claims.

In response to this motion to dismiss the plaintiff relies on the Supreme Court decision in Patrick v. Burget, _____ U. S. ____, 108 S. Ct. 1658, 100 L. Ed. 2d 83 (1988), Shahawy v. Harrison, 1989 U.S. App. LEXIS 9212 (11th Cir. 1989) and 42 U.S.C. §11111 through §11152 (Supp. 1987), for the proposition that the defendants herein are not absolutely immune from this action. This reliance, however, is misplaced. The issue before the court in Patrick was whether physicians were immune from federal antitrust liability for their activities on hospital peer review committees based upon the state action doctrine enunciated in Parker v. Brown, 317 U. S. 341, 63 S. Ct. 307, 87 L.Ed. 315 (1943). The issue before the Patrick Court was whether the state sufficiently supervised the private peer review of the hospital which had discharged a physician from its medical staff in order to invoke the state action exemption, which exempts official action by or directed by a state from anti-competitive actions. Patrick, supra. Similarly, in relying on Patrick, the Eleventh Circuit was required to determine whether the state action doctrine applied to a hospital board's termination of a physician's medical staff membership and other privileges. Shahawy, 1989 U.S. App. LEXIS 9212 at 13-16.

Both Patrick and Shahawy address and resolve issues not present in the pending matter. The defendants do not claim state action immunity from the plaintiff's claims nor is there any claim that the state was required to supervise the administration of the peer review process under 42 U. S. C. §1320c. The instant matter addresses federal actors/officers and prosecutorial

functions and the immunity granted to them. Thus, the argument that Patrick and subsequent cases construing Patrick are relevant to this determination are without merit.

Furthermore, although the plaintiff recognizes the grant of immunity for anti-trust claims for certain peer review organizations, as provided in 42 U. S. C. §11111 through §11152, the plaintiff urges that the defendants herein are not entitled to such immunity because certain prerequisite requirement were not satisfied in order to invoke the immunity. See 42 U.S.C. §11112. Again, plaintiff's reliance on these provisions is misplaced. Section 11111 applies to professional review action (as defined in §11151 (9) of Title 42. Professional review action is defined as "an action or recommendation of a professional review body . . ." 42 U. S. C. §11151(9). A professional review body is a "health care entity and the governing body or any committee of a health care entity which conducts professional review activity . . ." 42 U.S.C. §11151(11). A health care entity means a hospital, an entity which provides health care services, (HMO's) and a professional society of physicians or other licensed health care practitioners. 42 U.S.C. §11151(4). Thus, the provisions of 42 U. S. C. §§11111 through 11152 apply only to the health care entities, i. e., hospitals, health maintenance organizations or group medical practices, or professional societies of physicians or other health care practitioners. These provisions of the statutes do not apply to the peer review organizations established under the Medicare review structure, but rather to the types of peer review activities involved in Patrick and Shahawy.1

The actions taken by Crescent Counties and its Executive Director, were taken pursuant to 42 U.S.C. §1320c, and as such, these actions are afforded absolute immunity as enunciated in Kwoun, supra.

With respect to defendants Adair and Trusdell, as attorneys for Crescent Counties and Hyngstrom, no cause of action can exist against them. In that Crescent Counties and Hyngstrom are absolutely immune from any cause of action for their participation in the peer review organization, the plaintiff has no underlying actions taken by Crescent Counties and Hyngstrom upon which to base his action against Adair and Trusdell, for their advice to, and counselling of Crescent Counties and Hyngstrom.

Accordingly, Crescent Counties, Hyngstrom, Adair and Trusdell's renewed and expanded Motion to Dismiss Plaintiff's Second Amended Complaint is hereby granted with prejudice.

IT IS SO ORDERED.
DATED: This 31st day of July, 1989.

WILLIAM L. BEATTY
UNITED STATES DISTRICT JUDGE

1 As the Patrick Court pointed out, "[c]ongress in fact insulated certain medical peer review activities from anti-trust liability in the Health Care Quality Improvement Act of 1986, 42 U.S.C.A. §§11101-11151 (Supp. 1987)." The Patrick Court further recognized that this immunity did not apply in the Patrick case in that the events in Patrick occurred prior to the enactment of the Act, and therefore could not be applied retroactively. Patrick, 108 S.Ct. at 1665, n.8.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF ILLINOIS

Filed Sep 22, 1989
Stuart J. O'Hare
CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS
ALTON OFFICE
No. 89-5080

RUSSELL JAMES WOOD, MD,
Plaintiff,

-vs-

MELVIN J. FREEDMAN, MD, Et al.,
Defendants.

ORDER

The motion to dismiss Plaintiff's Second Amended Complaint filed by the defendants, Melvin Freedman, Central Illinois Medical Review Organization, et al., is called, heard and sustained.

It is therefore ordered that said motion to dismiss is granted and the defendants Melvin J. Freedman, MD, Central Illinois Medical Review Organization, Norman Taylor, MD, Chester Hill, MD, Edward DuVivier, MD, Harold J. Kolb, MD, Thomas O'Neill, George Taylor, MD, Walter Williams, MD, Marshall T. Hale, MD, Michael Brewer, MD, Michael Pick, MD and J.D. Winterhalter, MD are hereby dismissed from cause with prejudice.

WILLIAM BEATTY
Sep 22, 1989

Supreme Court, U.S.
FILED
JUN 3 1992
OFFICE OF THE CLERK

(3)

No. 91-1752

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

RUSSELL J. WOOD, M.D.,
PETITIONER

v.

MELVIN J. FREEDMAN, M.D., et al.,
RESPONDENTS

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENTS CRESCENT COUNTIES FOUNDATION FOR MEDICAL CARE AND THOMAS R. HYNGSTROM IN OPPOSITION

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28

QUESTION PRESENTED

Does 42 U.S.C. § 1320c-6 deprive Medicare Peer Review Organizations (and their agents) of the common law absolute immunity afforded other federal actors when performing prosecutorial functions?

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
OPINIONS BELOW	1
JURISDICTION	2
STATEMENT	2
1. Nature of the Case	2
2. The Duties of Medicare PROs	5
3. Section 1320c-6	8
REASONS FOR DENYING THE WRIT	10
I. THERE IS NO CONFLICT AMONG THE CIRCUITS	10
II. THE SEVENTH CIRCUIT'S ORDER DOES NOT CONFLICT WITH THE DECISIONS OF THIS COURT	12
III. PETITIONER HAS FAILED TO SHOW ANY OTHER BASIS FOR CERTIORARI	15
CONCLUSION	18

TABLE OF AUTHORITIES

CASES:	PAGE
American Hospital Ass'n v. *Bowen*, 834 F.2d 1037 (D.C. Cir. 1987)	15
Austin Municipal Securities, Inc. v. *National Ass'n of Securities Dealers*, 757 F.2d 676 (5th Cir. 1985)	15
Butz v. *Economou*, 438 U.S. 478 (1978)	15, 17
Chevron U.S.A. Inc. v. *Natural Resources Defense Council*, 467 U.S. 837 (1984)	10, 13, 14
Doyle v. *Secretary of HHS*, 848 F.2d 296 (1st Cir. 1988)	15
Dozier v. *Professional Foundation for Health Care, Inc.*, 944 F.2d 814 (11th Cir. 1991)	11
Farish for Farish v. *Courion Industries*, 754 F.2d 1111 (4th Cir. 1985)	16
Hampton v. *City of Chicago*, 484 F.2d 602 (7th Cir. 1973), *cert. denied*, 415 U.S. 917 (1974)	15
Hilst v. *Bowen*, 874 F.2d 725 (10th Cir. 1989)	6
Imbler v. *Pachtman*, 424 U.S. 409 (1976)	15
K Mart Corp. v. *Cartier, Inc.*, 486 U.S. 281 (1988)	14
Kissell v. *Breskow*, 579 F.2d 425 (7th Cir. 1978)	16
Kwoun v. *Southeast Missouri Professional Standards Review Organization*, 811 F.2d 401 (8th Cir. 1987), *cert. denied*, 486 U.S. 1022 (1988)	*passim*
Midlantic Nat'l Bank v. *New Jersey Dep't of Environmental Protection*, 474 U.S. 494 (1986)	16
Parker v. *Brown*, 317 U.S. 341 (1943)	12
Patrick v. *Burget*, 486 U.S. 94 (1988)	10, 12

Rice v. *Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70 (1955) 15

Summit Health, Ltd. v. *Pinhas*, 111 S. Ct. 1842 (1991) 10, 12, 13

Taylor v. *Flint Osteopathic Hospital, Inc.*, No. 84-1206 (6th Cir. May 29, 1985) (LEXIS, Genfed library, USApp file) 11

Thorbus v. *Bowen*, 848 F.2d 901 (8th Cir. 1988) .. 6

Westfall v. *Erwin*, 484 U.S. 292 (1988) 4

STATUTES AND REGULATIONS:

Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, 104 Stat. 1388 16

Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, 96 Stat. 389 16

Westfall Act, Pub. L. No. 100-694, 102 Stat. 4563 (1988) 4

42 U.S.C. § 1320c *et seq.* (1982) 5, 13

§ 1320c-2(c)(6)(a) 17
§ 1320c-3(a) 5
§ 1320c-3(a)(1) 5, 8
§ 1320c-3(a)(2) 6
§ 1320c-3(a)(5) 8
§ 1320c-3(a)(6) 6
§ 1320c-3(a)(7)(D) 8
§ 1320c-3(a)(10)(A) 8
§ 1320c-5 ..... 2, 7
§ 1320c-5(b)(1) 2, 6
§ 1320c-6 ..... 4, 5, 8, 9
§ 1320c-6(b) 4, 8, 9, 13, 14, 16
§ 1320c-9 8
§ 1395y(g) 5
§ 1395cc(a)(1)(F) 6

42 U.S.C.A. § 1320c-3(a) (West 1991) 5

42 U.S.C. § 11112 13

42 U.S.C. § 11151(4)(A) 13

42 C.F.R. §§ 498.61-498.63 7

42 C.F.R. § 498.80 7

42 C.F.R. Part 1004 2

42 C.F.R. § 1004.1, *et seq.* 6

§ 1004.40 6
§ 1004.60 6
§ 1004.70 6
§ 1004.90(b) 7
§ 1004.90(d) 7
§ 1004.90(e) 7
§ 1004.130(a)(1) 7

50 Fed. Reg. 15344-47 (1985) 6

MISCELLANEOUS:

118 Cong. Rec. 1017 (1972) 9

R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* (6th ed. 1986) 13

IN THE

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OCTOBER TERM, 1991

No. 91-1752

RUSSELL J. WOOD, M.D.,
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v.

MELVIN J. FREEDMAN, M.D., et al.,
RESPONDENTS

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENTS CRESCENT COUNTIES FOUNDATION FOR MEDICAL CARE AND THOMAS R. HYNGSTROM IN OPPOSITION

Respondents Crescent Counties Foundation for Medical Care and Thomas R. Hyngstrom respectfully submit this brief in opposition to the petition for a writ of certiorari in this case.

OPINIONS BELOW

The Order of the court of appeals (Pet. App. A1-A5) affirming the decision of the district court is unreported. The Order of the district court dated July 31, 1989 (Pet. App. B1-B8), granting respondents' motion to dismiss for failure to state a claim is also unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 25, 1991. Following an extension of time afforded by the Court, petitioner Russell James Wood filed his petition for certiorari on March 23, 1992, and it was rejected. Wood refiled his petition on May 4, 1992, and it was accepted for filing by the Clerk. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1).

STATEMENT

1. Nature of the Case. Pursuant to 42 U.S.C. § 1320c-5 and 42 C.F.R. Part 1004, the United States Department of Health and Human Services ("HHS") accepted the recommendation of respondent Crescent Counties Foundation for Medical Care ("CCFMC") that petitioner, a physician, be sanctioned by exclusion from participation in the federal Medicare program for a specified period. Pet. App. B2-B3. Petitioner then brought this action against respondents, who had recommended to the Office of the Inspector General ("OIG") of HHS that petitioner be sanctioned.

Respondents CCFMC and Central Illinois Medical Review Organization ("CIMRO") are Medicare Peer Review Organizations ("PROs") that are empowered under Section 1320c-5(b)(1) to recommend sanctions. Pet. App. B2-B3. Respondents Thomas Hyngstrom and Thomas O'Neill are the executive directors of CCFMC and CIMRO respectively. The remaining respondents are physicians who participated in the peer review of Dr. Wood.

The claims in petitioner's complaint against respondents are by turns scurrilous and incoherent. In his Second Amended Complaint, petitioner alleged that respondents' conduct in recommending charges to OIG violated, *inter alia*, the federal and Missouri antitrust laws, RICO, and the Due Process Clause. He also charged respondents

with common law negligence, libel and slander, tortious interference with contracts, and "WILFUL AND WANTON MISCONDUCT &/or IN FRAUD &/or IN CONSPIRACY &/or IN BAD FAITH &/or MALICIOUSLY &/or 'MANIFEST AND PALPABLE.' " Second Amended Complaint at 27 (App., *infra*, 3a).

The following is characteristic of petitioner's allegations:

> One or more OIG personnel were falsely advised by Defendant Freedman, MD and/or Hyngstrom, PhD, et al that Allegations must remain as substantiated because a One Year Sanction, which implied an admission by Dr. Wood of Medical Practice Misconduct, and although the OIG had read on and dismissed half of the 22 Allegations, the OIG left half in order to sanction the Plaintiff for 1 year (reduced from 5 years because of Review by Peer Reviewers of the 44 reported Allegations to CCFMC) even though the Plaintiff had 3 times on the last Record denied that he had done anything wrong and was not guilty of any Allegation of Medical Practice Misconduct and had 3 times refused a compromise offer of 1 year sanctioning on the Second Sanction Trial Record; . . .

Id. at 9 (App., *infra*, 1a). Elsewhere, petitioner charged respondents with "Permitting a Star Chamber Inquisitorial Proceeding to be conducted by Seven Physicians" (*id.* at 18 (App., *infra*, 2a)), and "Willfully and Wantonly et al Misrepresenting the correct dosages and range of correct dosages and usages of numerous medications . . . ." *Id.* at 29 (App., *infra*, 3a).

The United States District Court for the Southern District of Illinois, relying on the Eighth Circuit's decision in *Kwoun* v. *Southeast Missouri Professional Standards Review Organization*, 811 F.2d 401 (8th Cir. 1987), *cert. denied*, 486 U.S. 1022 (1988) (hereinafter *Kwoun*), held that (a) defendants were federal officers, (b) defendants acted as prosecutors in recommending that Dr. Wood be

sanctioned, and (c) defendants were therefore absolutely immune from Dr. Wood's claims.

Petitioner appealed to the United States Court of Appeals for the Seventh Circuit. At the invitation of the court of appeals, the Department of Justice filed a brief *amicus curiae* to address the potential applicability of the Court's decision in *Westfall* v. *Erwin*, 484 U.S. 292 (1988), and the Westfall Act, Pub. L. No. 100-694, 102 Stat. 4563 (1988), to petitioner's claims. In its submission, the United States joined in respondents' contention that their actions in recommending sanctions were protected by common law absolute immunity.

In an unpublished Order, the court of appeals affirmed the district court's decision.[1] Pet. App. A1-A2. The majority agreed with the district court that respondents were entitled to the common law absolute immunity afforded to federal officials acting in a prosecutorial capacity. *Id.* at A3. Like *Kwoun*, the majority also concluded that 42 U.S.C. § 1320c-6, which deals with the liability of PROs generally for all of their activities, was not intended to abrogate the common law absolute immunity afforded PROs and other federal officials when they perform prosecutorial duties.[2] *Id.* at A4.

Without mentioning the majority's reliance on common law absolute immunity for prosecutorial functions, petitioner has sought review in this Court of the majority's interpretation of Section 1320c-6. The *only* cases to in-

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[1] On January 16, 1992, the court of appeals denied the joint motion by these respondents and *amicus curiae* United States of America to publish its Order.

[2] In a two-paragraph dissent, Judge Cudahy reiterated the position of the *Kwoun* dissent that Section 1320c-6(b) precludes absolute immunity. *See* Pet. App. A5.

terpret Section 1320c-6, *Kwoun* and the instant case, both determined that Congress did not intend to foreclose PROs and their agents from invoking the absolute immunity available under federal common law to prosecutors. Accordingly, there is no conflict between the circuits that merits this Court's attention.

2. The Duties of Medicare PROs. A "utilization and quality control peer review organization" under 42 U.S.C. § 1320c *et seq.* (1982), consists of a representative group of physicians with different specialties from a given locality.[3] One PRO in each state contracts with the Health Care Financing Administration ("HCFA") of HHS. The state PRO, in turn, subcontracts with PROs located throughout the state to ensure that statutory objectives are fulfilled. In this case, CCFMC is the designated PRO for Illinois. At all times relevant to this action, respondent CIMRO was a sub-contractor PRO based in Champaign, Illinois.

Although the functions of PROs are growing increasingly numerous,[4] PROs have three primary responsibilities in implementing their congressional mission to ensure "the effective, efficient, and economical delivery of health care services." 42 U.S.C. § 1395y(g) (1982). First, PROs review a hospital's participation in the Medicare program to determine whether the hospital's services are medically necessary and allowable. 42 U.S.C. § 1320c-3(a)(1) (1982). To that end, the PRO enters into an agreement that permits the PRO to review "the completeness, adequacy, and quality

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[3] Respondents have cited statutory provisions governing PROs in effect in 1986 when respondents made their sanction recommendation.

[4] When enacted in 1982, 42 U.S.C. § 1320c-3(a), detailing many of the primary functions of a PRO, had 11 sub-parts. The number of sub-parts has now grown to 16. 42 U.S.C.A. § 1320c-3(a) (West 1991).

of care provided" by the hospital. 42 U.S.C. § 1395cc(a)(1)(F) (1982).

Second, PROs determine whether the amounts charged by individual physicians should be paid. 42 U.S.C. § 1320c-3(a)(2) (1982). In making these determinations, the PRO must identify and apply "professionally developed norms of care, diagnosis, and treatment." 42 U.S.C. § 1320c-3(a)(6) (1982). The PRO's determination whether to reimburse a physician's submitted charges is ordinarily conclusive. 42 U.S.C. § 1320c-3(a)(2) (1982).

Finally, as noted, Congress charged PROs with recommending to the OIG that physicians or hospitals be sanctioned for "grossly and flagrantly" violating their statutory obligations to provide appropriate medical care to Medicare beneficiaries. 42 U.S.C. § 1320c-5(b)(1) (1982); 42 C.F.R. § 1004.40.[5] Although not mentioned in the petition, numerous procedural requirements protect the rights of physicians at every stage of the sanctioning process.[6]

First, the PRO may submit a report recommending a sanction only "after reasonable notice and opportunity for discussion with the practitioner or person concerned." 42 U.S.C. § 1320c-5(b)(1) (1982). Upon deciding to recommend a sanction, the PRO submits its report to the OIG, and also sends a copy to the physician with notice that he or she has 30 days to submit additional material to the OIG. 42 C.F.R. § 1004.60; 42 C.F.R. § 1004.70.

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[5] The regulations now codified at 42 C.F.R. § 1004.1, *et seq.*, were originally adopted in 1985, *see* 50 Fed. Reg. 15344-47 (1985), and applied to Wood's sanction proceedings in 1986.

[6] In light of these requirements, the courts have repeatedly upheld the constitutionality of the sanctioning process. *See, e.g., Hilst* v. *Bowen*, 874 F.2d 725, 727-28 (10th Cir. 1989); *Thorbus* v. *Bowen*, 848 F.2d 901, 903-04 (8th Cir. 1988) (citing additional cases).

The OIG then decides, based on the PRO report and material submitted by the physician, whether a sanction is warranted. 42 U.S.C. § 1320c-5 (1982); 42 C.F.R. § 1004.90(b). The OIG must confirm whether:

(1) The PRO is following its procedures;

(2) A violation has occurred; and

(3) The practitioner or other person has demonstrated an unwillingness or lack of ability substantially to comply with an obligation.

42 C.F.R. § 1004.90(b). If the OIG concludes that a sanction is warranted, it imposes a sanction based on the recommendation of the PRO and the guidelines set forth in 42 C.F.R. § 1004.90(d).[7]

The appeals process from the OIG's determination is extensive. The objecting physician is entitled to a hearing before an Administrative Law Judge. 42 C.F.R. § 1004.130 (a)(1). At this hearing, the physician may call witnesses under oath, cross-examine witnesses, submit documents and briefs, and make oral argument. 42 C.F.R. §§ 498.61-498.63. The ALJ's decision is appealable to the Appeals Council. 42 C.F.R. § 498.80. The Appeals Council's decision is the final agency action. If the physician remains dissatisfied, he may appeal the sanction to the district court (with the usual right to appeal to the court of appeals if the physician is dissatisfied with the district court's decision).

In short, a persistent physician can obtain review by (1) the PRO, (2) the OIG, (3) an ALJ, (4) the Appeals

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[7] Ordinarily, the OIG imposes the sanction. *See* 42 C.F.R. § 1004.90(d). If, however, the OIG fails to act on the PRO's recommendation within 120 days after actual receipt of the PRO's report, the sanction recommended by the PRO automatically becomes effective. 42 C.F.R. § 1004.90(e).

Council, (5) a federal district court, and (6) the court of appeals. Neither the statute nor the applicable regulations, however, provide for civil actions against PROs and their agents.

While the foregoing are the three main functions of PROs, a PRO has a number of additional duties. A PRO must review professional activities in the area, 42 U.S.C. § 1320c-3(a)(1) (1982); consult with nurses and other non-physicians who provide health services regarding the PRO's ongoing review responsibilities, 42 U.S.C. § 1320c-3(a)(5) (1982); inspect the facilities of hospitals and physicians whose activities are subject to review, 42 U.S.C. § 1320c-3(a)(7)(D) (1982); and coordinate its activities and disseminate information to agencies responsible for reimbursing physicians and hospitals, 42 U.S.C. § 1320c-3(a)(10)(A) (1982). Except under very limited circumstances, a PRO may not disseminate confidential information regarding the activities of a physician or hospital. 42 U.S.C. § 1320c-9 (1982).

3. **Section 1320c-6.** Petitioner seeks review of the Seventh Circuit's disagreement with his interpretation of the effect of Section 1320c-6(b). This subsection provides:

> **(b) Employees and fiduciaries of organizations having contracts with Secretary**
>
> No person who is employed by, or who has a fiduciary relationship with, any such organization or who furnishes professional services to such organization, shall be held by reason of the performance by him of any duty, function, or activity required or authorized pursuant to this part or to a valid contract entered into under this part, to have violated any criminal law, or to be civilly liable under any law of the United States or of any State (or political subdivision thereof) provided he has exercised due care.

Nothing in Section 1320c-6 generally, or in Subsection 1320c-6(b) specifically, purports to limit the availability of

other common law immunities appropriate to the challenged function. Section 1320c-6 is entitled "Limitation on liability," and its provisions expand (not restrict) available immunity. Subsection 1320c-6(b), by its terms, applies to "*any* duty, function, or activity" of PROs, 42 U.S.C. § 1320c-6(b) (emphasis added), and thus, in many instances, affords immunity where none existed before. Significantly, Section 1320c-6(b) makes no specific reference to the prosecutorial duties of PROs and their agents.

Nor does the legislative history indicate in any way that Congress intended to limit broader common law immunities otherwise applicable to PRO functions. If anything, petitioner's quotation from Senator Bennett, a sponsor of the 1972 bill that created Medicare PROs (then called Professional Standards Review Organizations), shows that he did not anticipate civil actions against PSROs.

> The amendment [creating PSROs] is so structured that practicing physicians rather than Government agencies or insurance company personnel will decide whether care was necessary and of proper quality. At the same time, I have built numerous safeguards into the amendment to assure public accountability and proper and professional monitoring of the review organizations.

118 Cong. Rec. 1017 (1972) (remarks of Sen. Bennett). While Senator Bennett (and presumably Congress as a whole) desired "public accountability and proper and professional monitoring" of PSROs, it is clear that accountability and monitoring were "built * * * into" the statute, with its many layers of appeals. It is at best a twisted interpretation to consider a private lawsuit (especially of the kind brought here as apparent retaliation) to be "proper and professional monitoring" of the work of an entity actively and extensively supervised by the Secretary of HHS.

REASONS FOR DENYING THE WRIT

The decision below meets none of the criteria for certiorari. There is certainly no split in the circuits. *Kwoun* and the decision in this case are the only decisions from any circuit even to discuss whether Medicare PROs are entitled to absolute immunity when they act as prosecutors in recommending sanctions.

Equally lacking is a conflict with the decisions of this Court, which have never addressed the immunity afforded Medicare PROs for any of their activities. Although petitioner cites three decisions of the Court, *Patrick* v. *Burget*, 486 U.S. 94 (1988), *Summit Health, Ltd.* v. *Pinhas*, 111 S. Ct. 1842 (1991), and *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council*, 467 U.S. 837, 848 (1984), these decisions do not discuss federal actor immunity or Medicare PROs. Far from suggesting a conflict, these decisions do not, in any way, cast doubt on the decision of the court of appeals.

Finally, the existence of only two appellate decisions on the subject—although PROs have been in existence for nearly 20 years—demonstrates that the narrow question of statutory construction decided below does not merit review in this Court. Granting certiorari would, in any event, be a pointless exercise given petitioner's complete failure to provide substantial reasons for reversing the Seventh Circuit's decision.

I. THERE IS NO CONFLICT AMONG THE CIRCUITS.

Petitioner's primary attempt to satisfy the criteria for certiorari is to assert that there is a conflict among the circuits. Pet. 6. This assertion borders on the frivolous. Neither case cited by petitioner as being "in conflict" deals with the prosecutorial function of PROs. Indeed,

neither case discusses the scope of immunity afforded PROs at all.

Petitioner first cites an unpublished decision of the Sixth Circuit, *Taylor* v. *Flint Osteopathic Hospital, Inc.*, No. 84-1206 (6th Cir. May 29, 1985) (LEXIS, Genfed library, USApp file).[8] In *Taylor*, plaintiff alleged that the PRO had denied his claims for Medicare reimbursement in a racially discriminatory manner and conspired with a hospital to deprive plaintiff of his staff privileges. The Sixth Circuit nowhere mentioned (and therefore did not analyze), the prosecutorial duties of PROs in recommending sanctions to HHS. There is no evidence anywhere in the Sixth Circuit's unpublished opinion that the court even considered whether the PRO was entitled to immunity of any kind.

Petitioner's claim of a conflict between the decision below and *Dozier* v. *Professional Foundation for Health Care, Inc.*, 944 F.2d 814 (11th Cir. 1991), is equally groundless. *Dozier* deals with a claim that the PRO "issued a notice of [Medicare] payment denial that contains a defamatory statement." *Id.* at 815. The Eleventh Circuit held that, because the PRO (and its executive director) had complied with the then-applicable statute and regulations in sending the notice, the plaintiff had failed to state a claim. *Id.* at 817-18. Like *Taylor*, *Dozier* discusses

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[8] Although the petition contains a citation to the Federal Reporter, 765 F.2d 146, the page cited merely lists the case as an unpublished opinion. Compounding his confusion, petitioner, in his Table of Authorities, apparently believes the Sixth Circuit to have reviewed a district court opinion reported at 561 F. Supp. 1153 (E.D. Mich. 1983). In fact, the Sixth Circuit explicitly stated that it was reviewing only a later (unpublished) district court decision granting defendants' summary judgment motion. *Taylor*, *supra*, LEXIS slip op. at 2.

neither the availability of immunity generally nor the prosecutorial function of PROs in recommending sanctions.

Petitioner's claim of a conflict is simply false. In reality, the Eighth Circuit's 1987 decision in *Kwoun* has stood unchallenged by any other authority in the five years that have passed. This Court denied certiorari in *Kwoun*, and plaintiff has shown no reason why certiorari should be granted now from the Seventh Circuit's unpublished Order following *Kwoun*.

II. THE SEVENTH CIRCUIT'S ORDER DOES NOT CONFLICT WITH THE DECISIONS OF THIS COURT.

Petitioner's claim that the Seventh Circuit's decision conflicts with the decisions of this Court (Pet. 6) is also untenable. Plaintiff relies on *Patrick* v. *Burget*, 486 U.S. 94 (1988), and *Summit Health, Ltd.* v. *Pinhas*, 111 S. Ct. 1842 (1991). Neither case deals with Medicare PROs—nor with federally-created (and regulated) peer review organizations or with federal actors of any kind.

Rather than address the immunity available to federal actors, *Patrick* dealt with an entirely different type of immunity—the antitrust immunity afforded state action under *Parker* v. *Brown*, 317 U.S. 341 (1943). In *Patrick*, the Court held that the state action doctrine did not apply to the actions of a private hospital peer review committee in applying its own private standards. The Court had no reason to discuss Medicare PROs, and did not do so. The inapplicability of the state action doctrine to private unregulated conduct has no bearing here. This case involves an entirely different type of immunity. Moreover, it involves prosecutorial conduct that is mandated by a complex federal statutory scheme and subject to extensive administrative and judicial review.

Summit also involved a private hospital's own peer review process. The Court granted certiorari on a narrow jurisdictional question: whether defendants' conduct constituted interstate commerce under the Sherman Act. *See* 111 S. Ct. at 1844. The majority did note Congress' provision of limited immunity for *hospitals* whose peer review committees comply with the requirements of 42 U.S.C. § 11112. *Id.* at 1848 & n.12. Section 11112, however, has no application to Medicare PROs. *See* 42 U.S.C. § 11151 (4)(A) (defining "health care entit[ies]" protected by Section 11112). The Court thus had no occasion to discuss Medicare PROs, like CCFMC, that are authorized under 42 U.S.C. § 1320c *et seq.* Unsurprisingly, *Summit* does not discuss federal actor immunity or prosecutorial absolute immunity.

Finally, petitioner invokes *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council*, 467 U.S. 837, 848 (1984), to argue that both the Seventh and Eighth Circuits ignored the "plain language" of Section 1320c-6(b), which provides that an employee of a PRO (or any person having a fiduciary relationship to a PRO) is immune from liability "provided he has exercised due care." *Chevron*, of course, states a very general principle of statutory construction. It dealt neither with immunity issues nor with Medicare PROs.

Ordinarily, this Court has not granted certiorari when the petitioner asserts only a conflict with general principles and fails to show a "real or 'intolerable' conflict on the *same matter of law or fact*, not merely an inconsistency in dicta or in general principles utilized." R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* § 4.3, at 196 (6th ed. 1986) (emphasis added). The decisions of the Seventh Circuit below and the Eighth Circuit in *Kwoun* that the language of Section 1320c-6(b) does not compel the interpretation sought by petitioner hardly con-

stitutes the type of direct conflict necessary to justify certiorari.

Petitioner has failed to show a conflict for a more fundamental reason: the "plain language" doctrine provides no support for his construction. The "plain language" doctrine applies only if "the intent of Congress is clear." *Chevron*, 467 U.S. at 842. The doctrine requires that the courts "give effect to the *unambiguously* expressed intent of Congress." *Id.* at 843 (emphasis added). Where "the statute is silent or ambiguous with respect to the specific issue," the "plain language" doctrine does not apply. *K Mart Corp.* v. *Cartier, Inc.*, 486 U.S. 281, 291 (1988).

Congress has not "unambiguously expressed" an intention to deprive Medicare PROs of the common law absolute immunity afforded other federal actors who perform prosecutorial duties. The statute is silent as to those duties; it simply does not address the issue decided below.

Instead, as the Government argued in the Court of Appeals,

> The more plausible interpretation of [Section 1320c-6(b)] is that Congress meant to set a statutory floor on the immunity available to PROs and those participating in their activities. There is no reason to think that Congress meant for that floor to be a ceiling as well.

Brief for the United States as *Amicus Curiae* 12. The statute nowhere purports to limit other immunities or to create civil liability where none would otherwise exist. There is thus no conflict of any kind between the decision of the Court of Appeals and either the language of Section 1320c-6(b) or this Court's decisions.

III. PETITIONER HAS FAILED TO SHOW ANY OTHER BASIS FOR CERTIORARI.

In failing to make sustained arguments of any kind, the petition in this case falls far short of providing any other basis for granting certiorari. Justice Frankfurter long ago noted that review is inappropriate unless the petition presents "a problem beyond the academic or episodic." *Rice* v. *Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955). Aside from the published district court and appellate opinions in *Kwoun*, there appear to be no other published opinions deciding whether Medicare PROs are protected by absolute immunity when they recommend sanctions. There has certainly been no groundswell of suits against Medicare PROs requiring the Court's attention.

Missing from the petition is one other essential element: a persuasive argument that the decision below was incorrect. Plaintiff does not deny that defendants acted in a prosecutorial capacity.[9] He fails to discuss, let alone dispute, the absolute immunity that federal common law affords federal actors in performing prosecutorial duties. *See, e.g., Butz* v. *Economou*, 438 U.S. 478, 508-17 (1978); *Imbler* v. *Pachtman*, 424 U.S. 409, 421-24 (1976) (discussing historical growth of immunity); *Hampton* v. *City of Chicago*, 484 F.2d 602, 607-08 (7th Cir. 1973) (Stevens, J.), *cert. denied*, 415 U.S. 917 (1974). *Cf. Austin Municipal Securities, Inc.* v. *National Ass'n of Securities Dealers*, 757 F.2d 676, 689-92 (5th Cir. 1985) (disciplinary officers of private "self-regulatory organization" acted as pros-

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[9] *See Kwoun*, 811 F.2d at 408; *Doyle* v. *Secretary of HHS*, 848 F.2d 296, 302 (1st Cir. 1988) (Breyer, J.) ("PRO's dual role as prosecutor and judge"); *American Hospital Ass'n* v. *Bowen*, 834 F.2d 1037, 1048 (D.C. Cir. 1987) (PRO is "essentially an enforcement agent of the federal government").

ecutors entitled to absolute immunity); *Kissell* v. *Breskow*, 579 F.2d 425, 430 (7th Cir. 1978) (same).

Apart from ineffectually invoking the "plain language" rule, as discussed above, petitioner has not begun to show that Congress intended to permit suits based on sanctioning decisions. He has not explained why a statute that does not even mention a common law rule should be read to limit that rule. It is hornbook law that "[s]tatutes in derogation of the common law are not to be extended beyond their express terms." *Farish for Farish* v. *Courion Industries*, 754 F.2d 1111, 1115 (4th Cir. 1985). Accordingly, "[t]he normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific." *Midlantic Nat'l Bank* v. *New Jersey Dep't of Environmental Protection*, 474 U.S. 494, 501 (1986).[10] Neither the language nor the intent of the entire Medicare PRO statutory scheme, including Section 1320c-6(b)'s creation of statutory immunity for *all* PRO activities, hints at a statutory mandate to eliminate additional common law immunities applicable to specific activities.

Petitioner has not even identified public policy considerations from which it could be inferred that Congress intended to permit damage suits against Medicare PROs. While Congress intended that PROs be accountable for

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[10] We note that, after enactment of Section 1320c-6(b) in 1972, Congress has twice amended that subsection without limiting the availability of absolute immunity. *See* Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 4205(f), 104 Stat. 1388, 1388-114 (explicitly extending protection to PROs; statutory immunity was previously available only to employees and fiduciaries); Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, § 143, 96 Stat. 389 (eliminating proviso that defendant be "motivated by malice"). The 1990 revision occurred after the Eighth Circuit published its decision in *Kwoun*.

their actions, Congress mandated the elaborate appeals procedure detailed *supra* to ensure that any errors by PROs would receive thorough scrutiny.[11] But Congress did not intend potentially to destroy the viability of the sanctioning process by subjecting PROs and their participating reviewers to retaliatory suits. As the Court recognized in *Butz* v. *Economou*, a case expanding the availability of prosecutorial absolute immunity,

> there is a serious danger that the decision to authorize proceedings will provoke a retaliatory response. An individual targeted by an administrative proceeding will react angrily and may seek vengeance in the courts.

438 U.S. at 515. Absent explicit pronouncement to the contrary, Congress cannot be supposed to have encouraged litigation that would deter physicians from participating in peer reviews or from recommending sanctions should they participate.

In all respects, whether in attempting to meet the criteria for certiorari or in showing that the Seventh Circuit erred, the petition in this case is an exercise in futility. It should be denied.

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[11] Congress also empowered the Secretary of HHS to revoke the contract of a PRO that "has failed substantially to carry out the contract or is carrying out the contract in a manner inconsistent with the efficient and effective administration of [the peer review system]." 42 U.S.C. § 1320c-2(c)(6)(a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1992

APPENDIX

EXCERPTS FROM PETITIONER'S SECOND AMENDED COMPLAINT

COUNT I

SHERMAN AND CLAYTON ACTS VIOLATION COUNT:

* * * * *

7. 122 ALLEGATIONS OF MEDICAL PRACTICE MISCONDUCT BY PLAINTIFF,

111 WERE DISMISSED BY NON AREA PHYSICIAN ET AL REVIEWERS,

11 REMAIN SOLELY BECAUSE OF FRAUDULENT COMMUNICATIONS TO OIG BY DEFENDANT(S),

ST LOUIS ALJ ASSIGNED BY OIG TO HOLD DE NOVO HEARING ON 11 REMAINING ALLEGATIONS:

* * * * *

(2) OIG FRAUDULENTLY CONTACTED TO KEEP 11 ALLEGATIONS ALIVE:

One or more OIG Personnel were falsely advised by Defendant Freedman, MD and/or Hyngstrom, PhD, et al that Allegations must remain as substantiated because a One Year Sanction, which implied an admission by Dr. Wood of Medical Practice Misconduct, and although the OIG had read on and dismissed half of the 22 Allegations, the OIG left half in order to sanction the Plaintiff for 1 year (reduced from 5 years because of Review by Peer Reviewers of the 44 reported Allegations to CCFMC) even though the Plaintiff had 3 times on the last Record denied that he had done anything wrong and was not guilty of any Allegation of Medical Practice Misconduct and had 3 times refused a compromise offer of 1 year sanctioning on the Second Sanction Trial Record; and/or

* * * * *

COUNT III

COMMON LAW NEGLIGENCE COUNT

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(3) MULTIPLE DENIALS OF DUE PROCESS PERMITTED:

* * * * *

[1] STAR CHAMBER INQUISITIONING PROCEEDINGS OVER OBJECTIONS: Permitting a Star Chamber Inquisitorial Proceeding to be conducted by Seven Physicians at the First Sanctioning Trial over Objection by Plaintiff's Attorneys (with multiple objections never ruled on but "deferred") with Defendant West, JD voluntarily summarizing JD Objections with "You mean a Kangaroo Court?" and Boyarsky, JD-MD on the Record some pages later volunteering "Why, this is nothing but a Star Champer Proceeding", at the March 31, 1986 First Sanctioning Trial) by Negligently and Carlessly:

* * * * *

COUNT V

WILFUL AND WANTON MISCONDUCT &/or IN FRAUD &/or IN CONSPIRACY &/or "MANIFEST & PALPABLE"

* * * * *

8. DEFENDANTS WILFUL & WANTON MISCONDUCT &/OR IN FRAUD &/OR IN CONSPIRACY &/OR IN BAD FAITH &/OR MALICIOUSLY &/OR "MANIFEST AND PALPABLE" CHARGE:

* * * * *

(4) THE BAD MEDICINE CHARGES:

By Willfully and Wantonly et al Misrepresenting the correct dosages and range of correct dosages and usages of numerous medications which were reported and charged as being used improperly when they were actually being used properly (according to the Physicians Desk Reference (PDR 1984-1987), Conns Treatment, Merck Manual, et al, all standard Medical Texts and Current Medical Literature, etc) as documented in the Replies and Reports submitted by Plaintiff.